91-849

No._____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

ALISON E. CLAPP,

Petitioner,

-against-

DONALD GREENE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Has there not been reversible error upon the failure to convert to R.56 standard, particularly concerning an ERISA 1140 claim for which the selective *"Background"* omits all ERISA - claim - establishing facts though purporting their inclusion?

II.

Has not the Circuit failed to enforce controlling precedent, *"Fonte,"* requiring vacatur and R. 56 consequence upon a mandatory—nonetheless erroneously omitted—R. 12(b)(6) conversion to R. 56?

III.

Is not the RICO "pattern" dismissal erroneous in view of allegations of LLL&M's *continuing practice* (or *"policy"*) of subversion of "mainstay client accounts at other firms by luring away the billing partners as a means of increasing LLL&M's profitability or building it's client base" as alleged in Amended Complaint ¶¶'s 86-87, 115-116?

IV.

Is not recusal appropriate in view of the District Court's conduct towards AEC, e.g., the allowance of two (2) LLL&M summary judgment motions upon a sham defense against every claim beginning thirty-seven (37) days after commencement of the action, the simultaneous imposition of a complete discovery stay, the failure to address R.56(f) applications, the failure to docket applications for preliminary injunctions upon insupportable local rule reference, the adoption of *Trial By Affidavit* contention and impermissible inference in a *Background* nonetheless which erroneously omits all ERISA - claim - establishing facts and the grant of a represented

R.12(b)(6) dismissal without leave to amend, thereby avoiding determinations?

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follows:

ALISON E. CLAPP,

Petitioner,

v.

DONALD GREENE; DONALD J. GREENE, P.C.; TAYLOR R. BRIGGS; TAYLOR R. BRIGGS, P.C.; ALAN M. BERMAN; GEOFFREY D.C. BEST; DAVID P. BICKS; DAVID P. BICKS, P.C.; CHARLES W. HAVENS, III; CHARLES W. HAVENS, III, P.C.; DOUGLAS W. HAWES; DOUGLAS W. HAWES, P.C.; CARL D. HOBELMAN; CARL D. HOBELMAN, Chartered; JAMES F. JOHNSON, IV; RONALD D. JONES; RONALD D. JONES, P.C.; GRANT S. LEWIS; GRANT S. LEWIS, P.C.;CAMERON F. MACRAE, III; CAMERON F. MACRAE, III, P.C.; SAMUEL M SUGDEN; SAMUEL M. SUGDEN, P.C.; collectively a/k/a THE LEBOEUF, LAMB, LEIBY & MACRAE "ADMINISTRATIVE COMMITTEE", LEBOEUF, LAMB, LEIBY & MACRAE; IRVING MOSKOVITZ; PETER N. SCHILLER; JOHN A. YOUNG; THE LEBOEUF, LAMB, LEIBY & MACRAE BENEFIT PLANS; LEBOEUF, LAMB, LEIBY & MACRAE AND/OR PAUL R. STUKEN AND/OR THE LEBOEUF, LAMB, LEIBY & MACRAE "ADMINISTRATIVE COMMITTEE" AS "PLAN ADMINISTRATOR(S)"; JOHN C. RICHARDSON; and JOHN C. RICHARDSON, P.C.,

Respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED 2

A. Statutory Provisions . . . . . 2; Appendices E-I

B. Rule Provisions . . . . . 2; Appendices J-N

STATEMENT OF THE CASE 2

Jurisdiction of the United States District Court 9

REASONS FOR GRANTING THE WRIT 10

A. ERISA — Reversible Error: The Opinion's documented reliance upon "matters outside the pleadings" - AEC, Greene, and Stuken affidavit submissions "presented to and not excluded" - mandated R.12(b)(6) conversion to R.56 summary

judgment standard; it was plain error so to fail to convert the motion. 10

B. Reversible Error: Mis-description of the Record 19

C. Reversible Error: A RICO Pattern Is Alleged 23

D. Recusal Is Appropriate 29

CONCLUSION 30

APPENDIX *Page*

Appendix A - Opinion and Order of the United States District Court for the Southern District of New York, dated August 29, 1990 . . . . . 1a

Appendix B - Revised page 13, dated October 15, 1990, to the Opinion and Order dated August 29, 1990, of the United States District Court for the Southern District of New York 12a

Appendix C - Summary Order and Opinion of the United States Court of Appeals for the Second Circuit, dated March 29, 1990 . . . . . 14a

Appendix D - Order of the United States Court of Appeals denying Petition for re-hearing en banc dated May 13, 1990 . . . . . 19a

Appendix E - 29 U.S.C. §1132 ("ERISA") 21a

Appendix F - 29 U.S.C. §1161 ("COBRA") 23a

Appendix G - 18 U.S.C. §1961 ("RICO") 26a

Appendix H - McKinney's Consolidated Laws of New York §§180.03 and 180.08 ("Bribery Statutes") 28a

Appendix I - 28 U.S.C. §455 ("Recusal") 29a

Appendix J - FRCP Rule 8(a) 30a

Appendix K - FRCP Rule 12(b)(6) 31a

Appendix L - FRCP Rule 52(a) 32a

Appendix M - FRCP Rule 56 . . . . . 33a

Appendix N - Local Rule 3(c)(4) 36a

TABLE OF AUTHORITIES

CASES *Page*

Amsler v. Corwin Petroleum Corp., 715 F.Supp. 103 (S.D.N.Y. 1989) 28

Association for Reduction of Violence v. Hall, 734 F.2d 63 (1st. Cir. 1984) 18

Baker v. Kaiser Aluminum & Chem. Corp., 608 F.Supp. 1315 (N.D. Calif. 1984) 22

Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976) 18

Boesl v. Suburban Trust & Sav. Bank, 642 F.Supp. 1503 (N.D. Ill. 1986) 17

Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), **cert denied,** 467 U.S. 1251, 104 S.Ct. 3533 (1984) 18

Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232 (1972) 17

Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99 (1957) 16, 21

Corum v. Farm Credit Servs., 628 F.Supp. 707 (D. Minn. 1986) 22

Dister v. The Continental Group, 859 F.2d 1108 (2nd Cir. 1988) 13, 16, 17, 19, 21, 22, 23, 30

Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3rd Cir. 1988) 26

Ezold v. Wolf, Block, Schorr & Solis-Cohen, 90-002 (JMK) (E.D.Pa. 1990) 2

Page

Federal Paper Bd. Co., Inc. v. Amata, 693 F.Supp. 1376 (D.Ct. 1988) 26

Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d (2nd Cir. 1988) 10, 11, 16, 17, 18, 19, 21, 22, 30

Gavalik v. Continental Can Co., 812 F.2d 834 (3rd Cir.), **cert denied,** 484 U.S. 979 (1987) 16, 17, 22

Hecht v. Commerce Clearing House, 897 F.2d 21 (2nd Cir. 1990) 29

H.J., Inc v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893 (1989) 26, 28

Jacobson v. Cooper, 882 F.2d 717 (2nd Cir. 1989) 28

Kelly v. Chase Manhattan Bank, 717 F.Supp. 227 (S.D.N.Y. 1989) 22

Kross v. Western Electric Co., 701 F.2d 1238 (7th Cir. 1983) 16

Philan Ins. Ltd. v. Frank B. Hall & Co., Inc., 712 F. Supp. 339 (S.D.N.Y. 1989) 26

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989) 2

Proctor & Gamble Company v. Big Apple Industrial Buildings, Inc., 879 F.2d 10 (2nd Cir. 1989), **cert denied,** 110 S.Ct. 723 (1990) 26, 29

Saladino v. ILGWU Nat. Retirement Fund, 754 F.2d 473 (2nd Cir. 1985) 17, 21

Page

Sanders v. City of New York, 692 F. Supp. 308 (S.D.N.Y. 1988) 10

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 87 L.Ed.2d 346 (1985) 26

Shearin v. The E.F. Hutton Group, Inc., 865 F.2d 1271, 1281 (7th Cir. 1989) 28

Soley v. Star Herald Co., 390 F.2d 364 (5th Cir. 1968) 18

Swistok v. Jones, 884 F.2d 755 (3rd Cir. 1989) 28

Thompson v. New York Cent. R.R. Co., 361 F.2d 137 (2nd Cir. 1966) 18

United States v. Indelicato, 865 F.2d 1370 (2nd Cir.), **cert denied,** 109 S.Ct. 3192, 110 S.Ct.56 (1989) 28

United States v. Kaplan, 886 F.2d 536 (2nd Cir. 1989) 28

U.S. v. Zauber, 857 F.2d 137, 149 (3rd Cir 1988) 27

Wakefield v. Northern Telecom, Inc., 813 F.2d 535 (2nd Cir. 1987) 18

Walk v. Baltimore and Ohio R.R., 890 F.2d 688 (4th Cir. 1989) 28

STATUTES *Page*

Title 29 U.S.C. (**ERISA**)

§ 1132 . . . . . 2, 9, 16, 17, 21

1140 . . . . . 2, 13, 16, 17, 19, 22

1021, 1022, 1104 17

1161, **et seq (COBRA)** 2, 13, 10, 12, 13

Title 18 U.S.C. (**RICO**)

§ 1961 . . . . . 2, 4, 8, 9, 23, 26

1962 (d) 28, 29

Title 28 U.S.C. § 455 (**RECUSAL**) 2, 29

McKinney's Consolidated Laws of New York, Penal Law,
§§ 180.03, 180.08 . . . . . 2, 6, 9

RULES

Federal Rules of Civil Procedure:

R. 8(a) 4, 5, 6, 21

9(b) 5, 26

11 23

12(b)(6) 2, 4, 5, 9, 17, 18, 19, 21, 23

52(a) 2, 7, 16

56 . . . . . 2, 9, 13, 16, 17, 18, 20, 23

56(f) 3, 6, 10, 12, 13, 15

56(g) 6, 7, 18, 19, 20, 23

59(e) 4, 5, 29

United States District Court for the Southern and Eastern Districts of New York, Local Civil Rule 3(c)(4) 4, 21

OTHER AUTHORITIES

Wright & Miller, Federal Practice and Procedure **(Ed. 1990):** § 1366 18

In The

Supreme Court of the United States

October Term, 1991

ALISON E. CLAPP,

Petitioner,

v.

DONALD J. GREENE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the District Court (the **"Opinion"**) officially is reported as *Clapp v. Greene*, 743 F. Supp. 273 (S.D.N.Y. 1990) and appears in Appendix (**"App"**) A at 1a, with revision in App B at 12a. The United States Court of Appeals for the Second Circuit affirmed by Summary Order (**"the Order"**) which officially is not reported and appears in App C at 14a . The order of the United States Court of Appeals for the Second Circuit denying the petition for re-hearing en banc appears in App D at 19a.

JURISDICTION

The judgment of the United States District Court for the Southern District of New York, as revised, was entered on August 29, 1990. An appeal to the United States Court of Appeals for the Second Circuit was denied by Order dated March 29, 1991. A timely petition

for re-hearing *en banc* was filed April 12, 1991, and thereafter was denied on May 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: 29 U.S.C. §1132 *et seq*, (*"ERISA"*); 18 U.S.C. §1961 *et seq*, (*"RICO"*); New York Penal Law §§180.03 and 108.08; 28 U.S.C. §455 (*"Recusal"*); FRCP Rules 8, 12(b)(6), 52(a) and 56; and Local Civil Rule 3(c)(4).

STATEMENT OF THE CASE

Petitioner, Alison E. Clapp (**"AEC"**), seeks a writ of certiorari to the United States Court of Appeals for the Second Circuit upon the Circuit's Summary Order affirmance of District Court (the "Court") FRCP [**"R."**] 12(b)(6) dismissal orders grounded upon reversible error on the face of the Opinion and the Order. Illegally, Respondents (collectively **"LLL&M"**) are representing the expulsion of AEC without authority of a written partnership agreement and in contravention of 29 U.S.C. 1132 et seq., the Employee Retirement Income and Security Act of 1974 ("ERISA"). LLL&M's virtual sole defense, a purported **"at will dissolution"** is a sham which if adopted as an "alternative" to express expulsion provision would make irrelevant all partnership precedent in the United States concerning expulsion power and would eviscerate "at will" any Federal court "ordered partnership" remedy. See, e.g. *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 90-0002 (JMK) (E.D. Pa. 1990). Additionally, the dismissal was erroneous because AEC's amended complaint stated claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 et seq. ("RICO").

On March 13, 1990, AEC commenced this action under ERISA 1132 particularly referencing AEC's continuing benefits under LLL&M plans, including medical plans, grounded upon AEC's continuing status as an LLL&M partner and under ERISA 1140 and 1161 ("COBRA") referencing claims grounded upon LLL&M's represented expulsion for the purpose of interfering with AEC's continuing medical insurance coverage, together with pendent claims. On March 16, 1990, LLL&M advised the Court of their intention to submit a "motion to dismiss"; **on March 26, 1990, in the presence of LLL&M's counsel, the Court characterized the pleadings as a "hold-up"; thereafter, on April 16, 1990, LLL&M moved for summary judgment against all claims** including all ERISA claims upon submission of comprehensive Local Rule "3g Statements" virtually exclusively upon a purported "at will" dissolution defense upon the affidavits of D.J. Greene (**"Greene"**), LLL&M's Chair, and P.R. Stuken (**"Stuken"**), LLL&M's ERISA Administrator. LLL&M identified each ERISA plan, but produced none. Stuken acknowledged LLL&M's understanding of the COBRA claims relating to AEC's continuing efforts to bear a child.

On April 22, 1990, i.e. 37 days after commencement, the Court stayed all discovery, denying AEC's application for a stay of the motion and/or R.56(f) relief. (A 261-65). On May 24, 1990, AEC filed an amended pleading **adding** RICO claims concerning the Graubard Action (the "Graubard Action") infra p. 7. On May 25, 1990, AEC submitted opposition (the "AEC Opposition") through contention that AEC remains an LLL&M partner, that the "at will" defense was a sham and that R. 56(f) relief was necessitated. On June 14, 1990, AEC sought **preliminary injunctive relief**, including ERISA relief. On June 22, 1990, representing understanding "of 'Big Firm' problems," the Court urged AEC to abandon the legal system stating that the litigation could be **"long, arduous and bad for a party's health," that the "press would have a field-day with this scandal"** and for the first time, urging that AEC should retain other "independent" counsel, the Court

concluding with refusal to address AEC's subpoena request upon "a mass of evidence concerning... alleged improper client solicitation" in the Graubard Action (A 649-56). Later on June 22, 1990, again virtually exclusively upon the "at will" defense, LLL&M **moved for summary judgment against all claims,** including against all ERISA claims and upon additional, multiple "RICO" defenses, against all RICO claims. On June 29, 1990, the Court heard oral argument upon AEC's preliminary injunction application: subsequent to acknowledgment of absence of any LLL&M "notice of dissolution," absence of expulsion power in the partnership agreement and ERISA significance, the Court repeatedly stated that AEC's application—one which presented a single legal issue, LLL&M's at will defense, one which the Court observed left **"everything up for grabs"**—was **"under advisement."** The Court observed: "I understand what they have done. They have ***continued the Partnership*** under the same name with different partners..." (A 591) This, notwithstanding LLL&M affidavit submission, comprehensive 3(g) Statements and memoranda, all contending "dissolution at will." (A 549-97).

On August 8, 1990, the Court refused to docket AEC's June 14, 1990, preliminary injunction application upon grounds of "failure to comply with Local Rule 3(c)(4)," i.e. represented absence of urgency, nothwithstanding repeated AEC affidavits of urgency and continuing Court-acknowledged, uncontested, irreparable AEC injury. (A 409-10, 533-34, 797). On August 24, 1990, AEC filed a mandamus application together wth proposal for Court voluntary recusal (A 695). On August 29, 1990, the Court issued **the Opinion representing grant of summary judgment to LLL&M including express reliance upon "presented to and not excluded" LLL&M and AEC affidavits,** upon grounds (i) that the ERISA claims "failed to state a claim" ***or*** were not sufficiently alleged so as to place LLL&M on "notice" and (ii) that the RICO claims failed to state a "pattern"; the Court **dismissed the claims under R.12(b)(6)** without leave to amend. (App A).

In September, 1990, again AEC sought recusal; **additionally, AEC sought** R.59(e) relief together with continuing application for preliminary injunctive relief, which applications had remained undocketed since June 14, 1990. AEC sought recusal **prior to** ruling upon the R.59(e) and preliminary injunction applications, noting omission of reference in the Opinion to Amended Complaint §§120-126, other omitted matters of ERISA significance, infra pp. 10-15 and LLL&M's absence of R.8 ERISA objection. Further, the application sought vacatur grounded upon satisfaction of RICO pattern requirement, e.g. Amended Complaint §§'s 86 and 115 and AEC's Opposition Ex Apx 8 which exhibit presented unrebutted facts from LLL&M's own documents establishing that the "pattern" dismissal—one represented to have been grounded upon an absence of allegation "tending to show that LLL&M makes a **practice** of subverting mainstay client accounts at other firms... etc."—was erroneous, as well as request for vacatur of a stated finding concerning AEC's counsel.

On October 11, 1990, the Court addressed AEC's R.59(e)/recusal/preliminary injunction/application: **"I can't grant a preliminary injunction on these papers. It requires a hearing and what have you...** ***You have may be an equity right that this is a sham dissolution. You may be quite right..."***

The Court added that the Opinion's characterization of AEC as a "former" and "terminated" partner were ***not*** findings, but rather the "factual situation"; that AEC's status "could be litigated to a fare-thee-well" (A 769-72). [On October 18, 1990, the Court acknowledged that AEC's status exclusively presented a legal issue] (A 769). Additionally, the Court raised a "9(b) problem concerning the RICO claims"—a defense **not** presented by LLL&M. On October 18, 1990, again, the Court raised a RICO defense **not** presented by LLL&M: "You have to have a situation in which those partners are under an agreement...have not notified their partners that they're going to depart...[w]here they're under contract,...and

have no right to depart. Now, that is alleged, in the case of the partners in the Graubard firm,... But you would have to show that it also went on in connection with some other partners...." (A 780-82).

The Court stated that the ERISA claims were not sufficiently alleged to give LLL&M notice, nothwithstanding acknowledgment that LLL&M in two summary judgment motions upon the "at will" defense had not raised any R.8 objection and notwithstanding that the Opinion had relied for dismissal upon that ground (App A at 7a), the Court added: "Well maybe they do, but I've got to understand it" (A 783-84). AEC indicated limited interest in filing an amended RICO pleading dependent upon movment of a "frozen" case, one repeatedly subject to LLL&M summary judgment motion, all discovery stayed, AEC's application for R.56(f) relief unaddressed, AEC's preliminary injunction applications submitted, opposed, **heard,** then ordered not docketed, notwithstanding Court acknowledged, continuing, uncontested, irreparable AEC injury, with sole barrier to her relief one legal issue, LLL&M's "at will" defense. Additionally, AEC expressed concern that a widely publicized Opinion had not been vacated nor amended to eliminate LLL&M's **Trial by Affidavit** contentions, nor R.56(g) consequence. In response, the Court stated that when other LLL&M partners left **"I'll bet you that they went through some kind of a dissolution—I don't know",** notwithstanding that LLL&M's **sole** defense upon two voluminous summary judgment motions remained grounded exclusively upon a purported **"at will"** dissolution (A 785-89). Thereupon, (October, 1990), notwithstanding that since April, 1990, upon a complete discovery stay, LLL&M had moved for summary judgment against all claims, including against all RICO claims, the Court encouraged LLL&M to submit **additional RICO (and/or other) motions observing that such motions would not necessarily promptly be decided, notwithstanding Court-acknowledged, uncontested, continuing AEC irreparable injury,** unaddressed R.56(f) applications and (four-month earlier) filed, opposed and heard, then Court-ordered

not docketed, preliminary injunction applications, **because according to the Court, AEC could just be "blowing smoke in my eyes; taking up "a lot of my time"** (A 793-98):

> The Court: **[G]o up on appeal... maybe sometime you and your wife will finally figure out that you did make a wrong move...**
>
> The Court: ...[A]s [the ERISA paragraphs] **are numbered** and as they are realleged... [they] do not state a cause of action... **Now, I'm not going on whether off in the rear of the complaint thereafter something was alleged that might possibly have brought it into an ERISA complaint...**
>
> Mr. Callaghan: **You had all of the summary judgment motion practice...**
>
> The Court: **[Y]ou look at your complaint. Look at the numbered paragraphs. It's not within that** (A 816-21).

Notwithstanding LLL&M's partnership agreement repudiation of "at will" dissolution, the Court avoided ruling upon ERISA consequence: "It's somewhat original... I haven't seen an agreement drawn quite like this one, and it does raise questions (A 595); There is no question that provision strikes me as unusual." (A 788-89).

On October 26, 1990, the Court denied preliminary injunctive relief. Notwithstanding the Court's June 8, 1990, acknowledgement that: "The Court of Appeals requires it. I have to get findings and I have to write conclusions" (A 466-474), the order of denial does not include any mandatory R.52(a) findings of fact nor address AEC's Opposition application for R.56(g) sanction in consequence of LLL&M's summary judgment motions (A 821(A)).

RICO Amendment, May 24, 1990.

An action had been pending since May, 1988, (the "Graubard Action"), between present LLL&M "Of Counsel", Irving Moskovitz ("IM"), present LLL&M partners, Peter N. Schiller and John A. Young, (the "Moskovitz Group"), which action had been commenced by their former partnership (the "Graubard Firm"). On May 7, 1990, i.e. subsequent to LLL&M's initial omnibus summary judgment motion, an opinion was issued (the "Graubard Opinion") determining that:

> Moskovitz..., and the other defendants... joined [LLL&M]. [The Graubard Firm allege] that prior to departing... (the defendants, solicited **HLR** [F. Hoffman-La Roche & Co.] **and other clients** to transfer their business to defendants' new firm [LLL&M], which transfer in fact occurred..., [A]ccording to plaintiff, Moskovitz even **secretly solicited HLR clients** to desert the Firm while he was still connected with it... A partner at a firm is in a **fiduciary relationship with the Firm... [T]he "solicitation of a [law] firm's clients by one partner for his own benefit, prior to any decision to dissolve the partnership, is a breach of...fiduciary obligation and a breach of the partnership agreement...".** [T]he clients, though brought in by [Moskovitz], were... clients of the [Graubard] Firm... Plaintiff presents a **mass of evidence concerning the alleged solicitation**... [P]laintiff suggests that [d]efendants may well have led an executive search consultant and **partners of [LLL&M]** to believe that the HLR clients would follow... Some evidence... indicates an understanding with [LLL&M] partners that [Moskovitz] would get advance approval of the HLR clients for his move... [A 445-48].

Shortly thereafter, AEC amended the ERISA grounded complaint to add RICO claims, contending violations of New York's commercial bribery statutes (Penal Law §§ 180.03, 180.08), e.g., by the Moskovitz Group's, (fiduciaries/agents) illegal transfer to LLL&M and/or receipt by LLL&M upon an agreement or understanding to influence conduct in relation to the group's principal's (the Graubard Firm's) affairs, i.e. the transfer of Graubard Firm accounts to LLL&M, particularly tax accounts **including** those accounts relating to F. Hoffman-La Roche & Co., Ltd. and affiliates (the "HLR" or "MNC" accounts), together with other Graubard Firm accounts (the "Graubard Firm Accounts"), in exchange for continuing benefits of the LLL&M partnership (A 272-306, 323-331). Additionally, AEC alleged that LLL&M's "economic objectives included... a goal of attracting new clients; however, since unlikely to do so adequately with LLL&M's present partners", LLL&M implemented ***"a policy*** of acquiring individual lawyers laterally in substantial numbers, **e.g. the acquisition of the Moskovitz Group"** and had conspired clandestinely to maintain the secrecy of their activites (A 304-05). In consequence, the Amended Complaint alleged a **RICO "pattern."**

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Southern District of New York is based upon Federal question jurisdiction, upon Statutes of the United States, viz., the Employee Retirement Income and Security Act of 1974, 29 U.S.C. 1132 **et seq. ("ERISA")** and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-68 **("RICO"),** which statutes authorize suit in the District Court pursuant to 28 U.S.C. 1331, and upon the doctrine of pendent jurisdiction concerning those causes of action not otherwise subject to Federal question jurisdiction because all causes of action arise from a common nucleus of operative fact.

REASONS FOR GRANTING THE WRIT

A. ERISA—Reversible Error: The Opinion's documented reliance upon "matters outside the pleadings"—AEC, Greene, and Stuken affidavit submissions "presented to and not excluded"—mandated R.12(b)(6) conversion to R.56 summary judgment standard; it was plain error so to fail to convert the motion.

The Court had two options when presented with LLL&M's motions containing matters outside the pleadings, particularly relating to AEC's ERISA claims:..."the court may exclude the additional material and decide the motion on the complaint alone or it may convert the motion to one for summary judgment... and afford all parties the opportunity to present supporting material." *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988); **accord,** *Sanders v. City of New York*, 692 F. Supp. 308, 313 n2 (S.D.N.Y. 1988). The Court so converted the motion. Upon AEC's letter request for a stay so to allow for R.56(f) ERISA discovery, the Court ordered: "[AEC's] application for [time] to respond to [LLL&M's] summary judgment motion is granted." (A4, 261). **Definitively, the Court accepted and relied upon matters outside the pleadings. The Opinion, 743 F.Supp. at 274-75 includes stated reliance upon:**

(i) the LLL&M Partnership Agreement;
(ii) Greene Aff, Ex A;
(iii) Clapp Aff ¶¶7-8;
(iv) Clapp Aff ¶13;
(v) **Clapp Aff ¶15;**
(vi) Greene Aff ¶14 Clapp Aff ¶10;
(vii) Greene Aff ¶14;
(viii) Stuken Aff ¶5 **Clapp Aff ¶27;** and
(ix) Stuken Aff ¶6;

Upon recitation of this listing of materials outside the pleadings **"presented to and not excluded",** the Opinion next records: **"APART FROM THE FOREGOING ACTIONS WHICH APPARENTLY ARE THE BASIS FOR HER CLAIM UNDER**

ERISA..." 743 F. Supp. at 275. **However, in plain error, the Opinion omits reference to other necessarily relied upon *unrebutted* facts containted in *these* above referenced materials necessarily "presented to and not excluded."** For example, the Opinion omits reference to:

1. 1986-1990, Greene, Taylor R. Briggs, LLL&M long-term former Chair (**"Briggs"**) and John C. Richardson, LLL&M former Tax Department Head (**"Richardson"**), uncontested knowlege of AEC's efforts to bear a child, significant medical expenses ($62,000, 1988-1989), COBRA inquiries and LLL&M responses, represented need for continued significant medical expenses after 1989 and increasing need for medical assistance (**AEC Aff ¶¶15**, 17, Ex Apx 8-14);

2. LLL&M's late 1988 "redundant", "superfluous", "cuttable" partner lists, together with voluminous, unrebutted LLL&M documents demonstrating pretextual action against AEC. (**AEC Aff ¶15,** Ex Apx 8 (ss) (tt);*

3. In January, 1989, **after three (3) years without communication to AEC** (1986-88), Greene (LLL&M's Chair), telephoned AEC to inquire: **"Are your pregnant"**? (A4, 27-32; A377, **AEC Aff ¶15**, Ex Apx 9-11). As AEC's unrebutted opposition stated:

> [I]n January, 1989, from LLL&M's Los Angeles office, [Greene] telephoned me with two (2) inquiries: (a) are

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* Additionally **absent** reference, the Opinion states: "In September, 1989... [Greene] informed [AEC] of the **firm's decision** to terminate her as a partner." The Opinion's absence of reference is understandable since there is **not** affidavit or other evidence to support this mis-characterization of events, indeed, acceptance of a story presented exclusively in LLL&M's memoranda. (A 96, 246). However, since such "factual allegations" contained in legal memoranda were as well relied upon, ***Fonte*** requires reversal. 848 F.2d at 25.

you pregnant? and... These facts are as further elaborated in the Complaint (and Amended Complaint) [**AEC Aff ¶15**]:

> [Cplt ¶61, Amnd Cplt ¶169] Notwithstanding that...[Greene] had **not** communicated... with Plaintiff during... 1986... 1989, excepting [a billing inquiry]... in/about mid-January, 1989... [Greene] communicated by telephone...presenting only two inquiries: (i) "are you [Plaintiff] pregnant?" as [Greene] represented that he had been advised by an...LLL&M "English Client" that Plaintiff would take maternity leave in 1989...;
>
> [Cplt ¶62, Amnd Cplt ¶170] [P]laintiff advised [Greene] that...she was continuing efforts to have children...then inquiring about the identity of the... "English Client"; thereupon [Greene] refused to answer....;

4. One month later (February, 1989), Greene stated to AEC that she would not be assigned any legal work in 1989, excepting one matter (**AEC Aff ¶15**, A49, 284-86, 374-84);

5. Two months later (April, 1989), LLL&M admitted that a **30% increase** in medical premiums resulted in a "redesign of the plan to shift medical costs more towards those who incur greater medical costs...." (**AEC Aff ¶¶15, 27-28,** Ex Apx 9);*

6. Five months later (September 21, 1989), Greene stated to AEC that "**whether just or unjust**", AEC must "relocate" (**AEC Aff ¶15**);

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* The complaint was filed March 13, 1990. On April 16, 1990, LLL&M moved upon the Greene Affidavit for "summary judgment" upon the "at will" defense against all claims. On April 20, 1990, the Court stayed all discovery; the ERISA plans were never produced nor any other documents, nor was any witness deposed, notwithstanding AEC's prompt discovery requests and Rule 56(f) application.

7. Four months later, (January 1, 1990), LLL&M changed medical insurance carriers from long-term provider, Prudential, to Mass Mutual. (**AEC Aff ¶¶15, 27-28,** Ex Apx 9);

8. Two months later, (February-March, 1990), AEC inquired of LLL&M's ERISA Administrator, Stuken, relating to COBRA consequence upon AEC's pre-existing medical condition; Stuken's response included representation of a termination of AEC's medical plan benefits and notice to AEC and Mass Mutual of a purported change in AEC's status, viz. a COBRA "termination." (**AEC Aff ¶¶27-28**, Ex Apx 9-12).

None of these facts were contested by LLL&M. Predictable and obvious **interferences of specific intent** for ERISA 1140 illegal interference with AEC's medical benefits, i.e. "motivating cause", were available from this listing **of matters outside the pleadings necessarily** "presented to and not excluded" **mandatorily converting LLL&M's motions to R.56 standard.** Compellingly, these facts satisfy Circuit standard for presentation of a **prima facie** ERISA 1140 claim:

> [A] plaintiff establishes a **prima facie** case of unlawful termination by showing that the plaintiff (1) belongs to a protected group, (2) was qualified for the position, and (3) was discharged or denied employment **under circumstances that give rise to an inference of discrimination.** *Dister v. The Continental Group*, 859 F.2d 1108, 1114-5 (2d Cir. 1988). (Emphasis added).

Immediately upon presentation of LLL&M's initial April, 1990, omnibus motion, AEC sought R.56(f) relief particularly concerning the ERISA claims. As AEC's May, 1990, Opposition stated:

ERISA

AEC Aff ¶27. [I] provide grounds for Rule 56(f) relief.

> Aff ¶28. (i) In 1988-89, I incurred substantial medical expenses... [In] April, 1989, LLL&M represented that LLL&M's insurance carrier for many years... ["Prudential"], would increase premiums... by 30% and that LLL&M was "working with Prudential... **to shift costs more towards those who incur greater medical costs..."** [In] November, 1989, LLL&M announced that Prudential was to be replaced with... [**"Mass Mutual"**]...I inquired of [**Stuken**] concerning this change....[**Ex. "9"**].
>
> (ii) [In December, 1989/January, 1990],... counsel wrote to LLL&M relating to medical concerns. [**Ex. "10"**].
>
> (iii) [On] April 20, 1990,...counsel wrote to the Court about deficiencies in [Stuken's] Affidavit. These deficiencies are further evidenced in [Stuken's] February 26, 1990, memorandum with enclosures relating to LLL&M Benefit Plan information.[**Ex. "12"**]...
>
> ¶32 [I] have sustained myself, in part, upon savings which now virtually are depleted. Presently, I am unable to pay the $560.24 monthly insurance payment and likely soon will lose coverage. [I] am financially unable to continue the medical treatment which I am advised is indicated in order to promote child-bearing. [A]s a result of... LLL&M's actions, likewise adoption is precluded to me. (A402-05, 410).

In LLL&M's second summary judgment motion (June 22, 1990), LLL&M contended: "PLAINTIFF'S **ERISA CLAIM RAISES NO GENUINE ISSUE OF MATERIAL FACT**. [I]nstead of coming forward with evidentiary facts indicating how and why the defendants' **dissolution of the partnership constituted a violation of ERISA,** plaintiff suggests that: (a) she has not received benefits to which she claims to be entitled, including "continuation

coverage"; and (b) LLL&M discriminated against her because of her medical expenses. These allegations are **insufficient to raise a genuine issue of material fact** with respect to the ERISA claim. (A503-4)... **There is not a scintilla of evidence** even suggesting that plaintiff's medical expenses influenced the decision to dissolve and reconstitute the Firm without her.... "(LLL&M Mem., A503-510).

Notwithstanding AEC medical and other distress aggravated by ordered response to LLL&M's two omnibus summary judgment motions against **all** claims within **seven** (7) days, notwithstanding formal application for reasonable time extension–which application the Court declined to docket– within the time ordered (A 714-27), on June 29, 1990, again demonstrating requirement for R.56(f) relief, AEC responded:

> ¶4. Defendants' contention that "[t]here is not a scintilla of evidence..." is belied by LLL&M's receipt of voluminous copies of my medical insurance records,....
>
> ¶5. Moreover, [LLL&M's] October 30, 1989, letter to my counsel representing **60 days or less** in which I was required to "re-locate" [**AEC Aff ¶15**(x)] appears, in context, far more than a "mere scintilla." Additionally, [LLL&M's]...February 21, 1990, letter stated: "Please stop the fantasy that Alison is any longer a member of this firm;...**nor**, as we have constantly advised, **is Alison entitled to any of the benefits....**" [**AEC Aff ¶15;** Ex Apx 7] (Emphasis added)... This letter support an **intent by LLL&M adversely to affect my ERISA rights** in conjunction with the timing of the Firm's "moving on without me." (A 544-45).

None of these unrebutted facts are included in the Opinion. All, if referenced in the Order, are characterized by the Circuit as **"On appeal...circumstances..."** notwithstanding the Opinion's **"Background"** inclusion from **identical affidavit** source - often

identical affidavit sentence - of materials self-evidently outside the pleadings "presented to and not excluded", excepting notably excluded in the Opinion's inaccurate representation that **"apart from the foregoing actions which apparently are the basis for her claim under ERISA..."**. Compellingly, the pleadings had set forth ERISA claims upon which relief could have been granted, *Conley v. Gibson*, 335 U.S. 41, 47-48 (1957): "[A]ll the Rules require is "a short and plain statement of the claim" that will **give the defendant fair notice...** [This] is **made possible by**...opportunity for discovery **and... other pretrial procedures**[9]**.... The Federal Rules reject the approach that pleading is a game of skill....**[9]See e.g., **Rule 56**...." (Emphasis added).

Similarly absent from reference in the Opinion, notwithstanding *Fonte* "necessarily relied upon", is any reference to AEC's Affidavit included **Ex Apx 8** which evidences unrebutted, documented pretextual action against AEC and unrebutted facts supporting reasonable inferences of LLL&M specific intent to interfere with AEC's ERISA medical benefits in the premium-commingled partner/employee medical plan. See e.g., *Kross v. Western Electric Company*, 701 F.2d 1238 (7th Cir. 1983). Indeed, upon the **May, 1990**, filing of the AEC Opposition, **AEC's ERISA §1140 burden at the prima facie stage, *de minimus***, had been satisfied. *Dister*, 859 F.2d at 1114. However, in this meritorious ERISA action, LLL&M, together with the Court and the Circuit have attempted to present a **fait accompli** "former" partner characterization to AEC's status so to apply retrospectively the "mere consequence of termination" rationale of *Dister* and *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir.), **cert denied** 484 U.S. 979 (1987). These precedents are inapposite to AEC's ERISA 1132 claims - consistently unaddressed - except through a hurdling characterization of "former" and "terminated", notwithstanding absent mandated R.52(a) findings. These ERISA summary judgment precedents are inapplicable to AEC who has **NOT** been "terminated", not become a "former" partner under partnership law,

under contract or under ERISA: LLL&M's sham defense is no defense. LLL&M's, the Court's and the Circuit's reliance upon *Dister* and *Gavalik* for interpretation of ERISA 1140 was misapplied. This is not exclusively an 1140 action; also AEC presented 1132 claims concerning her **status,** *inter alia*, grounded upon *Saladino v. ILGWU Nat. Retirement Fund*, 754 F.2d 473, 477 n5 (2nd Cir. 1985) and a Federal Court's inherent power to remedy bad faith acts by fiduciaries. 29 U.S.C. 1021, 1022, 1104. See e.g., *Boesl v. Suburban Trust & Sav. Bank*, 642 F.Supp. 1503, 1515 (N.D. Ill. 1986). LLL&M's representation of expulsion remains unavailing; in truth, a defense insupportably grounded retrospectively upon a post-commencement of litigation "at will" dissolution sham.

Upon acceptance outside the pleadings of the materials identified above, the Court must have converted the motion to dismiss into one for summary judgment, but did not - or did so only in part (that part in contradiction to R.56 **Trial By Affidavit prohibition**)-as recorded in a **"Background"** which incongruously **omits all ERISA-claim-supporting facts** notwithstanding recorded form identical affidavit source. **Definitively, the Court upon accepting these materials lost discretion not to covert the motion.** *Carter v. Stanton*, 405 U.S. 669, 92 S.Ct. 1232 (1972); *Fonte*, 848 F.2d **supra**. All understood this; LLL&M submitted two "3g Statements" for summary judgment against every claim. Consistently, LLL&M conceded and the Circuit acknowledged both LLL&M's summary judgment intent and the Court's "conversion" - excepting conversion of that which counted, the **"ERISA" facts:**

> **JUDGE NEWMAN:** *Do you contend the ERISA claim was dismissed under Rule 12(b)(6) or motion for summary judgment?*
>
> **MR. SULLIVAN:** *Your Honor,* ***we moved pursuant to Rule 56....*** (Emphasis added). (Circuit oral argument; March 15, 1991, T19).

The conversion to summary judgment standard, the central issue before the Circuit, inexplicably is omitted in its Order, one which incongruously affirms R.12(b)(6) dismissals. The Order doubly aggravates the Opinion's error: (i) through failure to apply or even reference *Fonte* which had become the standard and (ii) through effort to overlook conversion requirement, thereafter characterizing the above **facts** which had been included by affidavit in the record as early as April-May, 1990 (**AEC Aff ¶15**, Ex Apx 11) as presented seemingly for the first time "On Appeal..." [as] three circumstances" (App C at 16a-17a). **It was reversible error for the Court to have considered outside matters without converting the motion to dismiss into a motion for summary judgment.** *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297 (9th Cir. 1982); *Thompson v. New York Cent. R.R. Co.*, 361 F.2d 137 (2nd Cir 1966); See Wright & Miller, **Federal Practice and Procedure**, § 1366 (Ed. 1990). Absent all discovery, such conversion was an abuse of discretion. *Association for Reduction of Violence v. Hall*, 734 F.2d 63 (1st Cir. 1984). As stated in *Wakefield v. Northern Telecom, Inc.*, 813 F.2d 535 (2nd Cir. 1987), the Court and the Circuit were precluded from choosing between competing inferences upon the conversion: "On a motion for summary judgment, ... the district could not properly enter judgment on the basis of the inference it preferred, for choosing between competing inferences is the province of the jury." Id. at 540-41 (Emphasis added).

The credibility of Greene's **Trial By Affidavit** contentions should not have been an issue for the trial judge; upon LLL&M's motions, AEC's version of the facts must have been accepted, but were not; all undisputed matters were to have been resolved in her favor, but were not. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976). Upon conversion, R.56 governed; LLL&M's burden changed to a summary judgment standard. The conversion applied as well to LLL&M's sole affirmative defense, the purported "at will" dissolution; **summary judgment in AEC's favor was required.** *Soley v. Star Herald Co.*, 390 F.2d 364 (5th Cir. 1968). Irrefutably,

LLL&M's motions were presented in bad faith or solely for the purpose of delay. R.56(g).

B: ERISA - Circuit Reversible Error: Mis-description of the Record

Confounded by an obvious *Fonte* mandated conversion requiring reversal, the Circuit was unable directly to address AEC's ERISA 1140 record, one compellingly satisfactory of *Dister's* prima facie standard. To avoid mandated reversal, the Circuit either (i) failed to enforce *Fonte*, the Circuit precedent which mandated conversion, or (ii) improperly re-converted LLL&M's summary judgment motions back to a R."12(b)(6)" analysis. Thereafter, upon adoption of LLL&M memoranda "theories", the Circuit improperly affirmed R."12(b)(6)" dismissal orders. This attempted to avoid the troublesome inconvenience of mandatory R.56(g) sanctions against a "Big Firm" for submission of a sham defense, Circuit review of numerous abuse of discretion standards under multiple Federal Rules in consequence of the conversion and vacatur of the Opinion in consequence of a "Background" adoption of LLL&M **Trial By Affidavit** contention and Court impermissible inference. Further, in the Order there is incorrectly presented a Circuit recitation of the Record which is insupportable. For example, the Order states:

> (i) AEC brought the action "[t]o **challenge her expulsion as a partner....**" (App C at 15a).

This is **not** supported by the pleadings, nor a voluminous record all of which contend that AEC remains an LLL&M partner, that there has been a **"represented expulsion"**, that LLL&M's self-help is illegal. AEC had sought ERISA declaratory relief concerning her **status**. (A 13-14; 308-09). The Court and the Circuit avoided this central issue, hurdling it. Admittedly absent any expulsion power, i.e. admittedly absent a defense to the pleadings, LLL&M concocted and presented in summary judgment fashion the "at will" defense,

a wilful contrivance presented only on/after April 16, 1990, by Greene; in July, 1990 by Briggs; and wilfully throughout by LLL&M's counsel (A 97, 602). It is of no validity to avoid ruling upon this defense through characterization for relation to "pendent claims". The Court acknowledged LLL&M's summary judgment submissions, indeed, converted the motions through stated reliance upon Greene **Trial By Affidavit** submissions, notwithstanding R.56 preclusion, notwithstanding AEC's uncontested Opposition. In consequence, recusal is appropriate, as are sanctions against LLL&M for submission of a sham defense. R.56(g) does not exonerate **any** bad faith defense.

> (ii) **"Clapp alleged** that her expulsion... was unlawfully accomplished by the device of dissolving..." (App C at 15a).

AEC did not present such allegations. This was and remains only an LLL&M alleged defense. AEC submitted opposition demonstrating that the defense remains a sham and a pretext for illegal self-help. Unable to dispute the express absence of expulsion power and definitive preclusion of "at will" dissolution in LLL&M's agreement, LLL&M did not attempt to address the consequences of their conduct. LLL&M, the Court, eventually the Circuit, all preferred to address this dispute by hurdling the determinative issue. Consistently, events have been portrayed through avoidance of the key event: by what right, upon what legal basis, has AEC "become" a **former** partner? Should the Court or the Circuit characterize a "spouse" barred from the marital home as a "former spouse" (omitting "findings"), has such spouse "become" a former spouse? Until judicial resolution of LLL&M's defense, under law, AEC remains an LLL&M partner; LLL&M's "at will" defense a cruel hoax and 18 month-long injurious sham.

The ERISA claims were not amplified in the May, 1990, Amended Complaint - a pleading which **added** RICO claims - because in April, 1990, LLL&M initially had moved for **summary**

judgment upon *Dister* and other ERISA summary judgment precedent absent any R.8 or other "notice" objection. Subsequently, in June, 1990, LLL&M repeated their summary judgment challenge, again absent R.8 objection. In consequence, only subsequent to LLL&M's initial motion, a complete discovery stay thereupon ordered, and issuance on May 7, 1990, of the Graubard Decision did AEC on May 24, 1990, amend the pleadings to **add** RICO claims. The Court's **October, 1990**, represented allowance for "amendment" to the ERISA pleading - an unnecessary exercise upon the conversion to summary judgment -further was undermined by express Court encouragement for additional LLL&M dilatory motion practice, notwithstanding Court-acknowledged, uncontested, AEC **in extremis** circumstance - her **June 14, 1990**, and subsequent preliminary injunction applications, upon erroneous Local Rule 3(c)(4) reference, Court-ordered not docketed on August 8, 1990.

> (iii) "[AEC]...alleged, with one exception, only **consequential interference...."** (App C at 16a).

This is inaccurate: the record presents AEC's request for ERISA 1132 declaratory relief under *Saladino* so to address a **"represented"** expulsion.

> (iv) "The one exception is.. 'concerning the ...Medical Plan'..." (App C at 16a).

Within days, without hesitation, absent any R.8 challenge, upon a complete discovery stay, **twice** LLL&M moved for "summary judgment" against every claim including against every ERISA claim, upon the "at will" defense - LLL&M's memoranda reveal this. LLL&M had "notice." *Conley*, **supra**. The factual support and reasonable, indeed, obvious inferences of illegal ERISA interference intent are presented in the above listed "facts", those facts necessarily converted to summary judgment standard. However, through Circuit failure of *Fonte* enforcement or upon Circuit re-conversion to R.12(b)(6) analysis, AEC's facts are not

"available" for examination under *Dister's* **de minimus** standard, notwithstanding required upon the conversion: in the Circuit's erroneous omission of *Fonte* analysis, "conversion" has not been recognized to have occurred notwithstanding that the "**Background**" affidavit references support nothing else. At least doubly, this is reversible error. Why has Alison Clapp's case against a Big Firm been treated so differently from every other ERISA plaintiff's? Neither a **Gavalik**, a **Dister**, a **Corum**, a **Baker**, a **Kelly**, nor any other ERISA plaintiff has been compelled to sustain under Court-acknowledged, uncontested, continuing irreparable injury and patent **Trial By Affidavit** abuse such a gauntlet of summary judgment motions unrelentingly litigated by a Big Firm just thirty-seven (37) days into the action, with all discovery stayed. Thereafter, compelling, procedurally valid preliminary injunction applications(s) were **heard**, months later insupportably ordered not docketed, additional months later, the case dismissed "on the pleadings" **without** leave to amend, notwithstanding the **Background's** revelation of mandatory conversion to summary judgment but omission of all facts supporting a **prima facie** ERISA 1140 case under definitive Circuit precedent. Why have significant adversaries, notwithstanding their submission of an easily and promptly perceived sham defense been provided with an insupportable, favorable public record upon **Trial By Affidavit** contention and irrefutable Court encouragement for submission of repetitive, cumulative motions whose only purpose and effect could be and has been further to make long and arduous this now 39 year-old, female plaintiff's ability to continue a meritorious litigation, one unnecessarily made bad for her health in an action in which her medical condition at the hands of her adversaries–a self-help-inclined, outlaw law firm–is a central issue?

The Circuit's represented concern for a flood of ERISA "mere consequence" cases is unfounded. Such a flood could arise only from those partners (or purported partners) who after incurring substantial ERISA monitored medical expenses are confronted with

a represented expulsion upon a sham "at will" defense. Congress provided for this concern through requirement for **mandatory** R.11 and 56(g) sanction.

> (v) "[n]one of these **circumstances were alleged** to indicate the **theory, now advanced...**" (App C at 17a).

The Circuit is unrelenting in a misguided effort to limit AEC to her pleadings, i.e. to support a R.12(b)(6) dismissal notwithstanding compulsory conversion to R.56. The Circuit's listing of "facts" not alleged or "nowhere set forth in the pleadings" is irrelevant upon the conversion. The characterization of "**now advanced**" is misleading since AEC's Opposition (May 25, 1990) included these facts in unrebutted paragraph after paragraph, indeed, the paragraphs by numbered reference "presented to and not excluded" in the Background, notwithstanding that not a sole ERISA-claim-supporting fact was revealed, although all contained in identical paragraph source.

> (vi). "[pleadings] **which...attribute her expulsion to the quite different theory...**" (App C at 17a).

This is unsupported by the pleadings and a voluminous record. This "theory" attributed to AEC nowhere is alleged by AEC since it is **not AEC's theory;** rather, that of LLL&M, contained only in their memoranda (A 509-10). The Circuit's adoption of LLL&M's "theory" upon the converted motion, is impermissible; it attempts to avoid an obvious *Dister* satisfaction of **prima facie** claim which had been established upon the conversion.

> (vii). **[t]he opportunity to file a third complaint...**" (App C at 17a). **(See Recusal, infra, Point D).**

REVERSIBLE ERROR:

C. A RICO Pattern Is Alleged

Erroneously, the Opinion states: *Plaintiff "alleges no facts tending to show that LLL&M makes a practice of subverting*

mainstay client accounts at other firms by luring away the billing partners as a means of increasing LLL&M's profitability or building its client base." (Emphasis added). (App A at 10a).

Definitively, *facts* supporting this **practice** are alleged. For example, the Amended Complaint alleges:

> ¶86. [LLL&M]... is conducting... affairs of LLL&M by... receiving the **HLR *and other* Graubard Firm accounts.**
>
> ¶87. In consequence... [LLL&M]... unlawfully... is conducting... these enterprises' affairs **through a pattern....** (A 296) (Emphasis added.)
>
> ¶115. LLL&M's... objectives included... a goal of attracting new clients; however, since unlikely to do so adequately with LLL&M's present partners... **LLL&M... have chosen to implement and have implemented *a policy* of acquiring individual lawyers laterally in substantial numbers, *for example,* the acquisition of the Moskovitz Group.**
>
> ¶116. In order for LLL&M... to assure receiving... commercial bribing income, i.e... $1,500,000 per annum **in HLR *and other* Graubard Firm account... earnings** and in order for the Moskovitz Group to assure receiving... approx. $1,000,000 per annum... [these Defendants] injured... Plaintiff....
>
> (A 304-06) (Emphasis added.)

Unrebutted evidence in the AEC Opposition presented a compelling factual account "tending to show" a **continuing LLL&M practice**, the acquisition of lateral partners so as to acquire their client bases, indeed, continuing proposals for such acquisitions notwithstanding conflicts with fiduciary standards. In pertinent part,

AEC's Opposition, **Ex Apx 8, "LLL&M Memoranda"**, demonstrated:

Ex.No.8	Date	Description of Memorandum
(g)	6.11.86:	need for **only** laterals with "established book[s] of business....";
(l)	3.15.87:	proposed ten (10) attorney lateral addition: a client base of "6 million guaranteed";
(aa)	4.20.88:	additional lateral partners
(mm)	7.27.88:	additional lateral partners; **"total business of...** [proposed lateral attorney] group = $10 million";
(ss)	10.12.88:	ii. acquisitions of lateral attorney groups at Washington, D.C. and at Harrisburg, Pa.; iii. collateral values: Moskovitz Group highly valued for HLR work;
(yy)	9.18.89:	LLL&M's "Windows of Opportunity" Mem: **LLL&M's two premises: "[w]e must continue to attract new clients; but we are unlikely to do so adequately with our present personnel"; LLL&M's *policy* to add "[n]ew strength by continuing to pick up individual lawyers laterally, in substantial numbers if appropriate, with [LLL&M] continuing to be the dominant body".**

As addressed in the Graubard Opinion, such "client bases" belong to "other firms". Are not breaches of fiduciary duty self-evident upon **assurances** of: "6 million guaranteed", "total business... of group = 10 million"? Is it doubted that at least Greene, Briggs and the Moskovitz Group anticipated and assured for themselves the lion's share of billing significance of the Graubard Firm Accounts, i.e. significant accounts, which **include** the HLR Account. Is it

doubted that the "solicitation" is alleged to be wrongful, is alleged to have occurred "unknown" to the Graubard Firm, indeed, that the "transfer" of accounts was/is an "integral part of the negotiations"? Diversion of business may be a ground for a commercial bribery claim. See e.g., *Philan Ins. Ltd. v. Frank B. Hall & Co., Inc.*, 712 F. Supp. 339 (S.D.N.Y. 1989) (dismissed for lack of 9(b) particularity - a defense not raised by LLL&M). Similarly, in *Federal Paper Bd. Co., Inc. v. Amata*, 693 F.Supp. 1376 (D.Ct. 1988), RICO claims grounded upon an analogous Connecticut commercial bribery statute were not dismissed: "[The]... complaint pleads at least two related acts of **commercial bribery...** in furtherance of a single scheme to bribe Federal's employee **in order to obtain commercial advantage** and "defraud" Federal. That is sufficient..." Id. at 1393.

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 87 L.Ed.2d 346 (1985) the Supreme Court concluded that a pattern requires "**continuity plus relationship**", 473 U.S. 496 n.14. Subsequently, the Court in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893. 106 L.Ed.2d 195 (1989), further broadly interpreted pattern, indeed, in a bribery context. The **three (3) person Moskovitz Group together with HLR and other Graubard Firm Accounts** were transferred to LLL&M in exchange for economic value, viz. Moskovitz Group continuing of counsel/partnership interests in LLL&M. These continuing payments and receipts *"themselves"* pose a threat for continuation so to maintain these accounts at LLL&M. See, *Proctor & Gamble Company v. Big Apple Industrial Buildings, Inc.* 879 F.2d 10 (2nd Cir. 1989) **cert denied** 110 S.Ct. 723 (1990): *"[W]hat is required is that the complaint plead a basis from which it could be inferred that the acts... were neither isolated not sporadic..."* **Id.** at 16. (Emphasis added).

Analogously, the Third Circuit found a pattern in *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3rd Cir. 1988):

> The predicate acts alleged... bribery,... were all... committed in connections with... payments... One could view these payments as a single illegal payment separated into installments, and thus as a one-time affair,... But, to focus only on the series of payments - i.e., **one bribe divided into four parts** - is to ignore the complexity of [the] scheme... [o]ver a two-year period - to influence [a] contract by illegal means. To facilitate their scheme, they hired a consultant... [who] developed [an] outwardly legal front.... **Id.** at 1063. (Emphasis added).

Again, the Third Circuit found a sufficient pattern: "[A]ll three... solicited kickbacks in exchange for their help in obtaining a $20,000,000 investment... Appellant... [e]videnced an attempt to hide the details... The... contract provided for a thirty year investment, ...the scheme was open-ended.... All... was for the purpose of obtaining...influence in exercising... **powers over... funds.** The acts all involved **one** particular **investment**. *U.S. v. Zauber*, 857 F.2d 137, 149 (3rd Cir. 1988). (Emphasis added).

LLL&M's activities were **not** a closed-ended, single scheme. Continuity, either closed or open-ended, is present: since about June, 1988, through today, repeatedly, LLL&M, including the Moskovitz Group, have engaged in regular and systematic commercial bribery through the transfer to and receipt by these participants of economic benefits in exchange for the transfer and retention of HLR **and other** Graubard Firm Accounts ("a closed period of repeated conduct"). Alternatively, this arrangement remains in place, indeed, presents "past conduct that by its nature projects into the future with a threat of repetition ["open-ended"]." A threat of continuity is demonstrated, e.g. in LLL&M's lateral acquisition **policy** "in substantial numbers, if appropriate". Thus, "[t]he threat of continuity may be established by showing that the predicate acts or

offenses are part of an ongoing entity's **regular way of doing business...**" *H.J., Inc.*, 109 S.Ct. at 2902 (Emphasis added).

Until now, the Second Circuit has supported a broad interpretation of pattern. *United States v. Indelicato*, 865 F.2d 1370 (2nd Cir.), **cert denied** 109 S.Ct. 3192, 110 S.Ct. 56 (1989) [before *H.J. Inc.*]; and *United States v. Kaplan*, 886 F.2d 536, 538 (2nd Cir. 1989) ("pattern" present upon alleged bribes which occurred in **one** conversation during **one** meeting) [after *H.J. Inc.*]. Multiple related acts occurring over an extended period, automatically established a pattern. *Jacobson v. Cooper*, 882 F.2d 717 (2nd Cir. 1989) ("partnership" facts).

Unrebutted, AEC's Opposition Ex Apx 8 is riddled with facts, promoting reasonable inferences concerning LLL&M's threat of continuity, indeed, "**practice** of subverting mainstay client accounts at other firms, etc." See generally, *Swistok v. Jones*, 884 F.2d 775, 757-58 (3rd Cir. 1989) (several predicate acts over 14 months: a sufficient pattern). Further, a single victim - single injury scheme has been held to satisfy a pattern. *Walk v. Baltimore and Ohio R.R.*, 890 F.2d 688 (4th Cir. 1989). In the background of LLL&M's documented expansion policy through acquisition of substantial numbers of lateral partners notwithstanding known fiduciary duty barriers, there exist "facts" supporting a "continuing basis" for this "pattern". See, *Amsler v. Corwin Petroleum Corp.*, 715 F. Supp. 103 (S.D.N.Y. 1989) (**one** oil well sale sufficient for RICO claim in background of such sales "on a continuing basis").

Significantly, the Opinion omits consideration of the RICO **conspiracy** claims. It is alleged that Greene, Briggs and Moskovitz particularly sought AEC's removal from assignment on behalf of Graubard Firm Accounts. See, *Shearin v. The E.F. Hutton Group, Inc.* 865 F.2d 1162 (3rd Cir. 1989) (overt acts in furtherance of conspiracy sufficient for standing). Precisely, "[i]njury from an overt act is necessary and sufficient to establish civil standing for a

RICO conspiracy violation." *Hecht v. Commerce Clearing House*, 897 F.2d 21, 25 (2nd Cir. 1990).

Undoubtedly, the **available** evidence indicates clandestine meetings between LLL&M, Richardson and the Moskovitz Group, concerning the transfer to LLL&M, i.e. evidence supports long-term, repeated agreement to commit the commercial bribery offenses together with numerous participants, meetings and complex, clandestine events. Further, there is clear allegation, indeed, unrebutted evidence of this continuing LLL&M illegal **"policy"**. This conspiracy is alleged; see e.g. Amend. Cplt. ¶¶'s 100, 107 (A 300-302). A sufficient nexus exists for the 1962(d) conspiracy claims and resultant injury to AEC, a victim excluded from these accounts, whose partnership assets/interests were depleted so to accomplish the acts. Preclusion of all discovery, particularly the Graubard Action "mass of evidence" and reasonable inferences therefrom to be drawn, militates in favor of vacatur. See *Proctor & Gamble Company v. Big Apple Industrial Buildings, Inc.*, 879 F.2d **supra,** at 18.

D. Recusal is Appropriate.

28 U.S.C. 455, the recusal statute, is self-enforcing. The Court was advised repeatedly of AEC's recusal concerns **prior to** issuance on August 29, 1990 of the Opinion, e.g. on June 27, 1990 (A 526-27); August 22, 1990 (A 624-62); and August 24, 1990 (Mandamus Petition, A 695, **in passim**). Likewise **prior to** the September 10, 1990, request for R.59(e) and preliminary injunctive relief, AEC sought ruling upon recusal. The June 29, 1990, argument upon AEC's preliminary injunction application demonstrated the absence of any LLL&M defense, the sham of the contended defense (A549-97). Thereafter, the Court avoided that reality, notwithstanding Court-acknowledged and LLL&M-uncontested, continuing, irreparable AEC injury. Months later, the Court hurdled the issue in the Opinion's ERISA "mere consequence" language through "**Background**" characterization of "former" and

"terminated" partner (A630-35), aggravating AEC's endurance of injury through absence of "findings". In clear error, the Court documented in a published Opinion from identical affidavit source, LLL&M's **Trial by Affidavit** contentions, but omitted AEC's uncontested rebuttal, dismissing the ERISA claims "upon the pleadings" notwithstanding compulsory conversion to summary judgment, a standard incongruously not applied to **facts** - not "circumstances" - indisputably which had established AEC's ERISA **prima facie** case under controlling Circuit precedent, *Dister*. (A 783-84, 792-96, 813-18).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted. Upon the ERISA claims, *Fonte* governs. Upon the RICO claims, the pleadings sufficiently had alleged a "pattern".

DATED
New York, New York
August 1, 1991

Respectfully submitted

DANIEL J. O'CALLAGHAN
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APPENDICES

APPENDIX A—OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED AUGUST 29, 1990

United States District Court

SOUTHERN DISTRICT OF NEW YORK

ALISON E. CLAPP,
Plaintiff,

-against-

DONALD J. GREENE, et al.,
Defendants.

Copies sent to Counsel of Record Aug. 29, 1990

90 Civ. 1690 (RPP)

OPINION AND ORDER

APPEARANCES

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ROBERT P. PATTERSON, JR., U.S.D.J.

This is an action for injunctive and declaratory relief and damages brought by a former partner in the law firm of LeBoeuf, Lamb, Leiby & McRae ("LLL&M"). Plaintiff alleges that the individual partners

of LLL&M have violated the Employee Retirement Income and Security Act of 1974, 29 U.S.C. §§1132 (a)(1)(B), (a)(3) and 1140, as amended, ("ERISA") and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq., as amended, ("RICO"). Plaintiff also alleges various tort and contract violations under state law. Defendants now move for summary judgment dismissing both federal and certain state claims pursuant to Fed. R. Civ. P. 56 and 12(b)(6) for failure to state a cause of action and for failure to plead claims of fraud with particularity under Rule 9(b). Plaintiff cross-moves for summary judgment pursuant to Rule 56 and for injunctive relief pursuant to Rule 65. For the reasons set forth below, defendants' motion is granted and plaintiff's cross-motion is denied.

BACKGROUND

Alison Clapp joined the law firm of LLL&M in 1981 as an associate attorney in the firm's tax department. Her work in the area of tax problems of regulated industries, especially those of public utilities, over the following four years earned her an invitation to join the LLL&M partnership. Clapp signed a Memorandum of Partnership Agreement dated January 1, 1986, (the "1986 Agreement") and in 1987 and 1988 signed amendments to the 1986 Agreement (collectively "the Partnership Agreement"). The Partnership Agreement provided that the term of the LLL&M partnership "shall be indefinite". Greene Aff., Exh. A.

During her years as an associate and continuing after she was made partner, plaintiff received nearly all of her billable work assignments from defendant John Richardson, at that time head of LLL&M's Tax Department. Amended Complaint ¶ 142. Despite her objections, plaintiff failed to obtain meaningful assignments from or involving other LLL&M tax partners. Clapp Aff. ¶ 7-8. In particular, during the years 1982 through 1986, plaintiff performed legal services under the direction of Richardson for one individual client, an English Insurer, amounting to 10-16% of her billable

hours. *Id.* ¶ 145. Richardson also directed plaintiff to perform certain apparently non-billable assignments for the American Bar Association Tax Section, representing to her that he had the approval of the LLL&M Administrative Committee. *Id.* ¶ 10. Finally, plaintiff claims that Richardson purposely "wrote off," or failed to bill, $300,000 worth of her services performed between 1983 and 1987. Clapp Aff. ¶ 13.

At the same time, plaintiff alleges that Richardson induced her to postpone her efforts to conceive a child until after her advancement to partnership in 1986. Amended complaint ¶ 166. Richardson allegedly made fraudulent representations assuring plaintiff that the firm would fully accommodate her in her childbearing efforts thereafter if, in consideration, she were to devote herself exclusively to her work prior to becoming a partner. Plaintiff now claims an increased difficulty in sustaining a pregnancy in detrimental reliance on defendants' earlier statements.

On October 26, 1988, Richardson announced his intention to withdraw from the LLL&M partnership and thereafter withdrew on November 15, 1988, taking tax work of the English Insurer client with him to a competing firm. Amended Complaint ¶ 200. Plaintiff claims that, following Richardson's departure, other LLL&M tax partners failed to direct assignments to her and that she was thus unable to maintain an acceptable level of billable hours, having been deprived of client development opportunities over the years. Clapp Aff. ¶ 15.

On February 21, 1989, defendant Greene, a member of the LLL&M Administrative Committee, met with plaintiff and allegedly informed her, in substance, that the firm was dissatisfied with her productivity and that there was no future for her at the firm. Greene Aff. ¶ 14; Clapp Aff. ¶ 10. Greene claims, however, to have offered plaintiff the chance to present a plan for improvement to remedy the situation. Greene Aff. ¶ 14.

In September, 1989, Greene informed plaintiff of the firm's decision to terminate her as a partner. Plaintiff objected to this termination and defendants maintain that the LLL&M partnership was dissolved on December 31, 1989, and a new partnership agreement signed as of January 1, 1990. Plaintiff was not included as a partner in the newly-formed partnership. Plaintiff was offered but declined to accept a lump-sum distribution of all accrued benefits under the LLL&M Retirement and Profit Sharing Plans, the 401(k) plan and her single participant profit sharing plan. Stuken Aff. ¶ 5; Clapp Aff. ¶ 27. Plaintiff has apparently elected to maintain self-financed continuing coverage under the LLL&M group health and medical insurance plan pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). Stuken Aff. ¶ 6.

Apart from the foregoing actions which apparently are the basis for her claim under ERISA against the defendants, plaintiff outlines a separate series of events for the purposes of establishing a RICO violation. Essentially, the complaint recites that defendants Irving Moskovitz, Peter Schiller, and John Young were tax partners in the New York law firm of Graubard, Mollen, Dannett, Horowitz & Pomeranz. These defendants resigned their firm to join LLL&M as partners in 1988, bringing a large client and several other clients with them to LLL&M.[1] Amended Complaint ¶ 20-22. Plaintiff complains that LLL&M through its Administrative Committee secretly guaranteed to Moskovitz, Schiller and Young, while each of them was still obligated under a partnership agreement to devote their efforts to the former firm, specific salaries and other benefits

---

[1] Moskovitz, Schiller and Young are also defendants in a pending action in New York Supreme Court alleging, *inter alia*, breach of contract and breach of fiduciary duty. *Graubard, Moskovitz, Dannett Horowitz & Mollen v. Moskovitz et al.*, No 23411/88.

if they were successful in transferring a large client account to LLL&M from their former firm. Moskovitz, Schiller and Young agreed and became partners of LLL&M on June 1, 1988. Plaintiff's RICO claim states that these acts were commercial bribery and bribe receiving in violation of New York Penal Law §180.03 and 180.08 as the required two predicate felonies, Amended Complaint ¶¶ 31-41, and deems the continuing receipt of compensation from LLL&M by Moskovitz, Schiller and Young to constitute a pattern of racketeering activity. *Id.* ¶ 60.

DISCUSSION

ERISA CLAIMS

A court should dismiss a claim under Federal Rule of Civil Procedure 12(b)(6) when it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Philips Business Sys., Inc. v. Executive Communications Sys., Inc.*, 744 F.2d 287 (2d Cir. 1984.). For this purpose, the allegations of the complaint are taken as true, *Cruz v. Beto*, 405 U.S. 319 (1972), and examination is made whether those allegations constitute a "short and plain" statement of a claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a). *See* Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1357. When examining the sufficiency of the complaint under rule 8(a), however, conclusory allegations merely stating the general legal conclusions necessary to prevail on the merits and which are unsupported by facts are not taken as true. *Packer v. Yampol*, 630 F. Supp. 1237, 1241 (S.D.N.Y. 1986); *M & M Transportation Co. v. U.S. Industries, Inc.*, 416 F. Supp. 865, 869 n.4 (S.D.N.Y. 1976). Examined in this light, plaintiff's allegations constitute a claim not cognizable under ERISA or are not sufficiently alleged to put defendants on notice so that they can form a responsive pleading.

Section 510 of ERISA provides: "It shall be unlawful for any person to discharge ... a participant or beneficiary ... for the purpose

of interfering with the attainment of any right to which such participant may become entitled under [an employee benefit plan]...." 29 U.S.C. § 1140 (1982). Section 510 essentially prohibits employers from, *inter alia*, "discharging ... their employees in order to keep them from obtaining vested pension rights." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (quoting *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980)).

Plaintiff claims that her expulsion from the firm interfered with her rights under ERISA by preventing her from continuing to be enrolled in LLL&M's pension benefit and health and medical plans.[2] However, plaintiff's claim that had she remained as a partner, she would have accrued additional benefits is not cognizable under §510. *Kelly v. Chase Manhattan Bank*, 717 F. Supp. 227, 232 (S.D.N.Y. 1989); *Titsch v. Reliance Group, Inc.*, 548 F. Supp. 983, 985 (S.D.N.Y. 1982), *aff d mem.*, 742 F.2d 1141 (2d Cir. 1983) ("No ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment."). *See also Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied.*, 484 U.S. 979 (1987) ("Proof of incidental loss of benefits as a result of a termination will not constitute a violation of §510.); *Corum v. Farm Credit Svcs.*, 628 F. Supp. 707, 718 (D. Minn. 1986) ("[P]laintiff must show more than lost opportunity to accrue additional benefits,"); *Baker v. Kaiser Aluminum & Chem. Corp.*, 608 F. Supp. 1315, 1319 (N.D.

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[2] Plaintiff's Amended Complaint ¶ 123 states in relevant part: "On or about December 31, 1989, and continuing thereafter LLL&M by and through the LLL&M Admin. Comm. ..., represented the expulsion of Plaintiff from LLL&M, thereby terminating and/or limiting Plaintiff's rights, benefits and entitlements to the LLL&M Benefit Plans," and that LLL&M's represented expulsion "is for the purpose of interfering with the attainment of rights to which Plaintiff may become entitled under [the LLL&M benefit plans] and under ERISA." *Id.* ¶ 125.

Cal. 1984) ("The only evidence offered by plaintiff is that if he had not been terminated, he would have been able to accrue additional benefits.")

Apart from this deprivation, there are no facts alleged to allow the Court to find that plaintiff can prove any set of facts in support of her claim. *See Packer v Yampol*, 630 F. Supp. at 1241 ("Plaintiffs bear the burden of pleading facts in support of each element of their 10b-5 claim, and they have not pleaded *facts* constituting an injury.") (emphasis in original). Her ERISA claims in paragraphs 123 and 125 of the complaint are stated as a mere conclusion of law. Her repetition and reallegation of paragraphs 13 through 118 add nothing of substance to the claim. The remaining allegations pertaining to this claim, contained in paragraphs 126 through 128, merely request particular relief. It cannot be said that these allegations sufficiently put defendants on notice of their actions so that they may form a responsive pleading. Accordingly, this claim is dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See Toomey v. Wickwire Spencer Steel Co.*, 3 F.R.D. 243 (S.D.N.Y. 1942) (dismissing complaint where it set forth a "hazy mass of conclusions" without any plain statement of the facts upon which the claim was based).

RICO CLAIMS

Section 1964(c) of the RICO statute authorizes a private cause of action for "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. §1964(c). To state a claim for damages under section 1964(c), a plaintiff must first allege a violation of the substantive RICO statute, 18 U.S.C. §1962(a)-(c). Under §1962(a)-(c), plaintiff must allege "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign

commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

The pattern requirement is a common thread in all three sections of the criminal RICO statute:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... to use or invest... any part of such income, or the proceeds of such income, in acquisition of any interest in ... any enterprise ....
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity ... to acquire or maintain ... any interest in or control of any enterprise....
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of such enterprise's affairs through a pattern or racketeering activity....

18 U.S.C. §1962.

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), the Supreme Court indicated that two predicate acts may not be sufficient to establish a pattern of racketeering activity within the meaning of §1962 where the "factor of *continuity plus relationship* which combines to produce a pattern" is missing. *See also Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir.), *vacated and remanded*, 109 S. Ct. 3236 (1989), *reaffirmed*, 110 S.Ct. 539 (1989); *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989).[3]

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[3] Analysis of continuity and relationship initially focused on the pattern element under *Sedima*, then shifted to the enterprise element under *United States v.*

A pattern is established for RICO purposes where the predicate acts "themselves amount to, or ... otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2901 (1989) (emphasis in original). The Supreme Court in *H.J. Inc.* explained that predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy the pattern requirement. *Id.* at 2902. In this case, plaintiff alleges a single predicate transaction, i.e., that the agreed upon compensation which LLL&M offered and defendants Moskovitz, Schiller and Young accepted to breach their partnership agreement and transfer certain client accounts from their former firm to LLL&M constituted commercial bribery.. Plaintiff alleges no facts from which a threat of continued bribery may rationally be inferred. *See Continental Realty Corp. v. J.C. Penney Co.*, 729 F. Supp. 1452 (S.D.N.Y. 1990); *USA Network v. Jones Intercable, Inc.*, 729 F. Supp 304, 318 (S.D.N.Y. 1990) (no threat of continuity where alleged purpose of fraudulent scheme was "essentially accomplished"); *Airlines Reporting Corp. v. Aero Voyagers, Inc.*, 721 F. Supp. 579, 584 (S.D.N.Y. 1989) (no pattern of racketeering activity where complaint alleged "a close-ended, single scheme involving three perpetrators ..., one victim ..., and an uncomplicated transaction....") LLL&M's continued payment of compensation to Moskovitz, Schiller and Young will not transform a single alleged bribe into a pattern for RICO purposes. *See also*

Ianniello, 808 F.2d 184, 191 (2d Cir. 1986) ("[T]he injury as to relatedness and continuity is best addressed in the context of the concept of 'enterprise'."), *cert. denied*, 483 U.S. 1006 (1987), but has now come to rest in this Circuit once again on the pattern element. *Beauford v. Helmsley*, 865 F.2d at 1391 ([O]ur analysis of relatedness and continuity has shifted from the enterprise element to the pattern element.").

Bingham v. Zolt, 683 F. Supp. 965, 970 (S.D.N.Y 1988) (improper to "characteriz[e] the defendant's subsequent enjoyment of the proceeds of the scheme as continuous criminal activity,") (analyzing enterprise element).

Nor is there any showing that a threat of continuity exists because the predicate acts are a regular way of conducting defendant's ongoing legitimate business. *H.J. Inc.*, 109 S. Ct. at 2902. Plaintiff alleges no facts tending to show that LLL&M makes a practice of subverting mainstay client accounts at other firms by luring away the billing partners as a means of increasing LLL&M's profitability or building its client base. *See Azurite Corp. v. Amster & Co.*, 730 F. Supp. 571, 581 (S.D.N.Y. 1990) (short-term, closed-ended scheme did not show threat of continuity absent allegations that defendants had committed the same or similar acts before or that they had committed them again after the period in question); *Continental Realty*, 729 F. Supp. at 1455 ("[T]here is no reason to believe that Home Depot will continue to provide dummy bids for the Defendants in other real estate transactions."). Accordingly, plaintiff's RICO claims are dismissed in their entirety.

STATE CLAIMS

The only asserted bases for federal jurisdiction in this case are plaintiff's RICO and ERISA claims. Amended Complaint ¶ 9-10. Having found these claims deficient, the Court declines to exercise pendent jurisdiction over the state claims, counts three through fifteen, and these will be dismissed as well. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Chase Manhattan Bank, N.A. v. Fidata Corp.*, 700 F. Supp. 1252, 1261 (S.D.N.Y. 1988).

CONCLUSION

In conclusion, the plaintiffs have failed to allege either an ERISA or RICO violation in conformity with the governing statutes, and defendant's motion to dismiss those claims is therefore granted.

Plaintiff's motion for injunctive relief is denied. Because the state law claims are dismissed for lack of jurisdiction, plaintiff's motion for summary judgment on those claims is denied. Both parties' motions for sanctions under Fed. R. Civ. P. 11 are denied.

It should also be noted that the Court does not appreciate being served with six inches of papers which plaintiff's counsel delivered to chambers on August 24, 1990, and identified as an undocketed mandamus petition that he would be forced to file if the Court did not act in this case prior to August 29, 1990. The Court has advised counsel at earlier appearances that his marital relationship with plaintiff was bound to blind his professional judgment. The Court finds counsel's conduct unbecoming a member of the bar of this Court. If counsel wished to file a petition for mandamus, he should so file it.

SO ORDERED.

Dated:
New York, New York
August 29, 1990

/Signature
Robert P. Patterson, Jr.
U.S.D.J.

APPENDIX B—REVISED PAGE 13, DATED OCTOBER 15, 1990, TO THE OPINION AND ORDER DATED AUGUST 29, 1990, OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

United States District Court

SOUTHERN DISTRICT OF NEW YORK

ALISON E. CLAPP,
Plaintiff,

Copies sent to Counsel of Record Oct. 16, 1990

-against-

DONALD J. GREENE, et al.,
Defendants.

90 Civ. 1690 (RPP)

REVISED PAGE 13 TO OPINION AND ORDER DATED 8/29/90

APPEARANCES

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By: Robert K. Ruskin

claims is denied. Both parties' motions for sanctions under Fed. R. Civ. P. 11 are denied.

It should also be noted that the Court does not appreciate being served with six inches of papers which plaintiff's counsel delivered to chambers on August 24, 1990, and identified as an undocketed mandamus petition that he would be forced to file if the Court did not act in this case prior to August 29, 1990. The Court has advised counsel at earlier appearances that his marital relationship with plaintiff was bound to blind his professional judgment. The Court finds counsel's conduct unbecoming a member of the bar of this Court. If counsel wished to file a petition for mandamus, he should so file it. Plaintiff's counsel has advised the Court that he supplied the mandamus petition on the advice of a Legal Coordinator on the staff of the Second Circuit and that such a procedure was intended to be a courtesy to this Court. The Court accepts this explanation of counsel's intention but disapproves of the procedure followed.

SO ORDERED.

Dated:

New York, New York
October 16, 1990
/Signature
Robert P. Patterson, Jr.
U.S.D.J.

APPENDIX C—SUMMARY ORDER AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 29, 1990

United States Court Of Appeals

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of March , one thousand nine hundred and ninety-one.

PRESENT:

HONORABLE JON O. NEWMAN,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE JOHN M. WALKER, JR.,
Circuit Judges.

ALISON E. CLAPP,

Plaintiff-Appellant,

v. 90-9008

DONALD GREENE, ET AL.,

Defendants-Appellees.

/seal
United States Court of Appeals
Filed Mar 29 1991
Elaine B. Goldsmith, Clerk
Second Circuit

ORDER

Alison E. Clapp appeals from the August 29, 1990, order of the District Court for the Southern District of New York (Robert P.

Patterson, Jr., Judge), as amended by an order entered October 17, 1990, and from the order entered October 26, 1990. The August 29 order granted summary judgment to the defendants, the New York City law firm of LeBoeuf, Lamb, Leiby & MacRae and certain named partners, in a suit brought by Clapp to challenge her expulsion as a partner. The October 17 order added two clarifying sentences to indicate that the District Court accepted the explanation of plaintiff's counsel for what the Court had perceived as a threat to file a mandamus petition. The October 26 order denied motions for recusal, for injunctive relief, and for relief under Fed. R. Civ. P. 59(e), and granted leave to amend the amended complaint within 15 days. Plaintiff declined to amend further, electing to stand on the amended complaint. Though it appears that no separate document was entered setting forth a judgment of dismissal, it is apparent that the District Court and the parties regard the action as finally dismissed.

Clapp alleged that her expulsion from the law firm was unlawfully accomplished by the device of dissolving the partnership on the last day of 1989 and reconstructing it on the first day of 1990 without her as a partner. The suit alleged federal causes of action grounded on RICO, 18 U.S.C. § 1961 *et seq.* (1988), and ERISA, 29 U.S.C. §§ 1132 (a) (1) (B), (a) (3), 1140, 1161 (1988), as well as various theories of state law. Defendants sought dismissal under both Rules 12 (b) (6) and 56; Judge Patterson ruled that the RICO and ERISA claims were deficient as pleadings and dismissed them for failure to state a claim. He then declined to exercise pendent jurisdiction over the various state law claims.

This suit is an entirely misguided attempt to bring state law claims for wrongful expulsion from a law firm partnership into federal court by attaching them to insufficient federal claims. The RICO claim alleged that the LeBoeuf firm had committed commercial bribery in violation of New York law by offering compensation to three

lawyers of another New York City law firm upon their leaving their former firm and joining the LeBoeuf firm. *See* N.Y. Pen. Law § 180 (McKinney 1988). Judge Patterson, bypassing the substantial issue of whether such conduct could possibly be bribery under New York law, correctly found the pleading of the RICO claim manifestly deficient for failure to allege facts indicating a pattern of racketeering activity. As he noted, no facts were pleaded to support the element that the alleged predicate acts "themselves amount to, or ... otherwise constitute a threat of, *continuing* racketeering activity." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, 2901 (1989).

The ERISA claim is equally deficient. Appellant recognizes that the severance of an employment relationship in not actionable under ERISA simply because it has the consequence of denying continued pension or other employee benefits, but only if the denial of such benefits was a motivation for the discharge. *See Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). In both her original and amended complaint, appellant, using identical language, alleged, with one exception, only consequential interference with benefits. Complaint, ¶¶ 15, 17, Amended Complaint ¶¶ 123, 125. The one exception is an allegation that the LeBoeuf firm's purported expulsion of appellant "...concerning the [firm's] Group Health and Medical Plan, is for the purpose of interfering with the attainment of rights to which Plaintiff may become entitled under this plan and under Erisa." Complaint, ¶ 17, Amended Complaint, ¶ 125. As Judge Patterson correctly noted, her ERISA claims are "mere conclusion[s] of law" devoid of factual support. If entertained, every discharge could become a federal court ERISA suit by the simple device of a conclusory allegation of motivation.

On appeal, appellant contends that her claim of a discharge motivated to deny ERISA health benefits is supported by three

circumstances: (a) she incurred $62,000 in medical expenses covered by the firm's health insurance policy during 1988 and 1989 in connection with her attempts to become pregnant, (b) the firm was concerned about rising health insurance costs (partners paid their own premiums) and switched medical insurance carriers to obtain more favorable rates, and (c) the chairman of the firm's administrative committee called her from California in January 1989, stated that an English client had told him that appellant was planning to take maternity leave in 1989, and inquired, "Are you pregnant?" Appellant's own complaint demonstrates that none of these circumstances were alleged to indicate the theory, now advanced, that the firm expelled her to lessen the cost of medical insurance premiums to the remaining partners. The amount of Clapp's medical expenses and the inquiry as to her pregnancy were not even alleged in her ERISA claim, but instead were included in a state law cause of action alleging that the firm committed fraud by falsely representing that she would receive more favorable consideration for maternity leave if she deferred her pregnancy until after she become a partner. The allegation concerning the firm's interest in holding down increases in health insurance premiums is nowhere set forth in the complaint. Had Clapp, who is vigorously represented by her lawyer husband, wished to allege that her expulsion from the firm was motivated by the firm's desire to hold down group insurance premiums by eliminating her future medical expenses, it would have been simple to assert such a claim in a straightforward manner. That claim, however, is totally absent from both her original and amended complaints, which, in any event, attribute her expulsion to the quite different theory that the partner with whom she had been working left and she was given insufficient work thereafter. Moreover, though Judge Patterson extended the opportunity to file a third complaint, once the conclusory nature of her purported ERISA claim was brought to her attention, Clapp

declined the opportunity. Under the circumstances, the dismissal for failure to state a sufficient federal claim was entirely correct.

With the dismissal of the federal claims, there was no basis for injunctive relief, nor was there any substance to the afterthought motion seeking the District Judge's recusal. Clapp remains free to pursue her state law claims in state court.

The orders of the District Court are affirmed.

/signatures

Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX D—ORDER OF UNITED STATES COURT OF APPEALS DENYING PETITION FOR RE-HEARING EN BANC DATED MAY 13, 1990

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirteenth day of May, one thousand nine hundred and ninety-one.

Docket Number 90-9008

/seal
United States Court of Appeals
Filed
May 13, 1991
Elaine B. Goldsmith, Clerk
Second Circuit

ALISON E. CLAPP

Plaintiff-Appellant,

v.

DONALD GREENE; DONALD J. GREENE, P.C.; TAYLOR R. BRIGGS; TAYLOR R. BRIGGS, P.C.; ALAN M. BERMAN; GEOFFREY D.C. BEST; DAVID P. BICKS; DAVID P. BICKS, P.C.; CHARLES W. HAVENS, III; CHARLES W. HAVENS, III, P.C.; DOUGLAS W. HAWES; DOUGLAS W. HAWES, P.C.; CARL D. HOBELMAN; CARL D. HOBELMAN, Chartered; JAMES F. JOHNSON, IV; RONALD D. JONES; RONALD D. JONES, P.C.; GRANT S. LEWIS; GRANT S. LEWIS, P.C.;

CAMERON F. MACRAE, III; CAMERON F. MACRAE, III, P.C.; SAMUEL M. SUGDEN; SAMUEL M. SUGDEN, P.C.; collectively a/k/a THE LEBOEUF, LAMB, LEIBY & MACRAE "ADMINISTRATIVE COMMITTEE", LEBOEUF, LAMB, LEIBY & MACRAE; IRVING MOSKOVITZ; PETER N. SCHILLER; JOHN A. YOUNG; THE LEBOEUF, LAMB, LEIBY & MACRAE BENEFIT PLANS; LEBOEUF, LAMB, LEIBY & MACRAE AND/OR PAUL R. STUKEN AND/OR THE LEBOEUF, LAMB, LEIBY & MACRAE "ADMINISTRATIVE COMMITTEE" AS "PLAN ADMINISTRATOR(S)"; JOHN C. RICHARDSON; JOHN C. RICHARDSON, P.C.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant, Alison E. Clapp.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/signature
ELAINE B. GOLDSMITH
Clerk

APPENDIX E—29 U.S.C. §1132 ET SEQ ("ERISA")

Section 502 of ERISA, 29 U.S.C. § 1132, provides in pertinent part:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A)

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

* * *

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter

brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Section 510 of ERISA, 29 U.S.C. § 1140, provides:

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of any employee benefit plan, this subchapter..., or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter,... The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

APPENDIX F—29 U.S.C. §1161 ET SEQ ("COBRA")

ERISA, 29 U.S.C. §1161. et seq, ("COBRA") provides in pertinent part:

§ 1161. Plans must provide continuation coverage to certain individuals

(a) In General

The plan sponsor of each group health plan shall provide, in accordance with this part, that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan.

* * *

§ 1162. Continuation coverage

For purposes of section 1161 of this title the term "continuation coverage" means coverage under the plan which meets the following requirements:

(1) Type of benefit coverage

The coverage must consist of coverage which, as of the time the coverage is being provided, is identical to the coverage provided under the plan to similarly situated beneficiaries under the plan with respect to whom a qualifying event has not occurred. If coverage is modified under the plan for any group of similarly situated beneficiaries, such coverage shall also be modified in the same manner for all individuals who are qualified beneficiaries under the plan pursuant to this part in connection with such group.

(2) Period of coverage

The coverage must extend for at least the period beginning on the date of the qualifying event and ending not earlier than the earliest of the following:

(A) Maximum required period

(i) General rule for terminations and reduced hours.—In the case of a qualifying event described in section 1163(2) of this title, except as provided in clause (ii), the date which is 18 months after the date of the qualifying event.

* * *

(D) Group health plan coverage or medicare entitlement

The date on which the qualified beneficiary first becomes, after the date of the election—

> (i) covered under any other group health plan (as an employee or otherwise) 'which does not contain any exclusion or limitation with respect to any preexisting condition of such beneficiary', or

* * *

§ 1163. Qualifying event

For purposes of this part, the term "qualifying event" means, with respect to any covered employee, any of the following events which, but for the continuation coverage required under this part, would result in the loss of coverage of a qualified beneficiary:

(1) The death of the covered employee.

(2) The termination (other than by reason of such employee's gross misconduct), or reduction of hours, of the covered employee's employment.

* * *

§ 1167. Definitions and special rules

For purposes of this part—

(1) Group health plan

The term "group health plan" means an employee welfare benefit plan providing medical care (as defined in section 213(d) of Title 26) to participants or beneficiaries directly or through insurance, reimbursement, or otherwise.

(2) Covered employee

The term "covered employee" means an individual who is (or was) provided coverage under a group health plan by virtue of the performance of services by the individual for 1 or more persons maintaining the plan (including as an employee defined in section 401(c)(1) of Title 26.

(3) Qualified beneficiary

(A) In general

***

(B) Special rule for terminations and reduced employment

In the case of a qualifying event described in section 1163(2) of this title, the term "qualified beneficiary" includes the covered employee.

***

APPENDIX G—18 U.S.C. §1961 ET SEQ ("RICO")

18 U.S.C. §1961 et seq, "RICO," in pertinent part provides:

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, which is chargeable under State law and punishable by imprisonment for more than one year...

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;...

* * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....

(b) It shall be unlawful for any person through a pattern of racketeering activity... to acquire or maintain, directly or indirectly,

any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

APPENDIX H—MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK §§180.03 and 180.08 ("BRIBERY STATUTES")

Sections 180.03 and 180.08 of Penal Law, McKinney's Consolidated Laws of New York, provide:

§ 180.03 Commercial bribing in the first degree

A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars.

Commercial bribing in the first degree is a class E felony.

§ 180.08 Commercial bribe receiving in the first degree

An employee, agent or fiduciary is guilty of commercial bribe receiving in the first degree when, without consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars.

Commercial bribe receiving in the first degree is a class E felony.

APPENDIX I—28 U.S.C. §455 ("RECUSAL")

Section 455 of Title 28, Judiciary and Judicial Procedure, provides in pertinent part:

§ 455 Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

APPENDIX J—FRCP RULE 8(a)

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief,... shall contain (1)..., (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

* * *

APPENDIX K—FRCP RULE 12

Rule 12 Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(a) When presented...

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading,... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:... (6) failure to state a claim upon which relief can be granted,... If, on a motion asserting the defense numbered (6) to dismiss fo. failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

* * *

APPENDIX L—FRCP RULE 52(a)

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.... Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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APPENDIX M—FRCP RULE 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, be examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further

proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as it just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the

other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX N—LOCAL RULE 3(c)(4)

In pertinent part the

United States District Courts for the
Southern and Eastern Districts of New York

in pertinent part provide:

CIVIL RULES

Rule 3. Motions...

(c) The notice of motion, supporting affidavits and memoranda, with proof of due service, shall be served in accordance with the following:...

(4) No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary.

* * *